

SOUTH AFRICA / JUDGMENT

## D.B v Brand and Another (Leave to Appeal) (13157/2024) [2024] ZAWCHC 411 (6 December 2024) [2024] ZAWCHC 411

COURT

Western Cape High Court, Cape Town

BEFORE

A Bhoopchand

CASE / FILE NUMBER

13157/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 13157/2024

In the matter between

D[...] B[...]

FIRST APPLICANT

and

ECKERT BRAND

FIRST RESPONDENT

MASTER OF THE HIGH COURT, CAPE TOWN SECOND RESPONDENT

JUDGMENT

on leave to appeal

Date of hearing: 27 November 2024

Date of judgment: 6 December 2024

BHOOPCHAND AJ:

1. Where lies the straw in the vast ocean of words that evades the clutches of a floundering cause? Where lies the error in adjudication, in which neither fault of intent nor negligence

unfolds? In the hidden meaning between the lines, in the uncrossed tease and the dotty ayes, nestled amongst the subliminal

nuances of interpretation and the conundrums that neither logic nor reason divulges. Perhaps, but there, in the cheerless chambers of judicial dormitories where independence is jealously expressed through the pen's might that validates or vitiates, the elusive thread of truth emerges, intertwined with conscience and compassion of purpose, tempered by the application of law and the pursuit of justice, the quest for the straw crumbles.

2. The First Respondent applies for leave to appeal the judgment handed down on 28 September 2024. For this judgment, the Court retains the citation of the parties as reflected above. The Respondent has raised 44 grounds of appeal, which, together with its subparagraphs, amounts to a substantial total of about seventy
- (70) grounds of appeal. The formulation of the grounds of appeal did not lend themselves to easy correlation with the judgment. The Applicant, Ms B[...], who opposes the application, expressed similar difficulties. Respondent's Counsel disavowed any obligation to reference the grounds of appeal in the offending paragraphs of the judgment or the record, although there was a cursory attempt to reference twelve of them in the record. During oral argument, the Court insisted that Counsel identify the paragraphs or portions of the record upon which a ground of appeal was premised. The process which unduly lengthened the hearing did little to enable the Court to comprehend the alleged errors arising from them.

#### THE GROUNDS OF APPEAL

3. Some of the grounds of appeal were wrong. e.g., ground 8.8, where the Respondent alleges that the Court summarised the facts incorrectly in that the Respondent did not seek to replace the Applicant in German litigation. Page 84 of the bundle of documents has a copy of the letter the Respondent wrote to the Judges of the German Court on 13 July 2023. The Respondent explained to the Judges that the Applicant could not pursue the matter in her own name. He alone “can decide whether he intends to replace D[...] as Claimant and pursue the claim”.
4. Ground 7 alleges that the Court found that the Respondent was the author of the will. The Court never made that finding. In ground 8.10, the Respondent alleges that the Court summarised the plan for the Respondent to retain the close corporation incorrectly. The Respondent suggested he proposed a distribution plan to enable the Applicant to retain her German units. This is incorrect. The Respondent had suggested that the Applicant would have to give up at least one or two of her three units to enable him to retain the close corporation as the corporation was verging on insolvency. Through his Counsel during oral argument, the Respondent elaborated that the estate was verging on insolvency, to a question posed by the Court to clarify this aspect. Ground 8.11 suffers the same fate. It is

incorrect. As alluded to, the Respondent had indicated that the estate was verging on insolvency and would liquidate the close corporation if he had to. The latter was made in answer to the Applicant's allegation that the Respondent would try to preserve his part of the inheritance, which included 4 per cent of the membership in the close corporation. Ground 8.12 alleges that the Court summarised the evidence incorrectly when it said that the Respondent preferred to pay the maintenance of the deceased's first wife and the body corporate to maintain the building in Germany. The Respondent referenced paragraph 144 of the judgment for this error. The evidence before the Court was that the first wife was paid her maintenance, but the Applicant was not. The evidence clearly indicated that the Respondent had suspended the Applicant's maintenance payments in preference to paying the German body corporate to maintain the public open spaces of the German building.

5. Other grounds of appeal interpreted the Court's recital of the party's respective cases as findings of the Court, e.g., Ground 8.5, which relates to paragraph 35 of the judgment and alleges that the Applicant was given notice of the Respondent's intention to intervene in the German proceedings. Apart from the difficulty of understanding how the Court summarised the statement incorrectly, the Respondent failed to grasp that the Court was referring to the Applicant's allegation. Ground 8.6 suffers from the same fate. Paragraph 59 contains allegations made by the parties. They are not incorrectly summarised. Ground 8.9 is tersely stated as follows: "There was no loan account in GRG", under the allegation that the Court had incorrectly recorded this allegation. The Court summarised the Applicant's evidence in paragraph 135 of the judgment, which was referenced as the offending paragraph. This was not a finding of the Court.
6. Other grounds of appeal are incomprehensible even after oral argument, e.g., Ground 13. Ground 13 contends that the Court erred in finding that the First Respondent represented H[...] in proceedings, in circumstances where H[...] was included in the divorce settlement proposal, purely because of the litigation between H[...] and the Applicant. The Respondent referenced paragraph 134 of the judgment for this error. Apart from correcting the third sentence from the end of the paragraph to read "... protecting H[...]’s interest...", the Court cannot comprehend this ground of appeal.
7. Ground 22 deserves the same criticism. The parties dealt with transferring the German units to H[...] at about the time the Applicant and the deceased decided to separate. The Respondent

canvassed the facts relating to the deceased's debt at length, particularly in the annexures to the answering affidavit. The Respondent sought to defend the deceased's transfer of many German units to H[...] concurrently with the commencement of his divorce from the Applicant. The Respondent referred to the restructuring of the deceased's debt in detail, which enabled the Court to make an informed assessment of the Deceased's debt. The deceased's debt played little part in the Court's

order to remove the Respondent as the estate executor. The Respondent could recall details and deny others, which exposed his allegiance to H[...]. The foregoing would also indicate why the remaining grounds listed under paragraph 22 are baseless. The Respondent criticises the Court for converting values reflected in the Euro currency to that of the Rand without the assistance of expert evidence. Yet, he insists that the Court consider expert evidence he submitted on the exact subject without confirmation by affidavit.

8. Ground 26 falls into this category of incomprehensible grounds of appeal. The Respondent did not refer to the offending paragraph or parts of the judgment upon which this ground is premised. Ground 27 suffers the same fate. The Court acknowledged early in the judgment that the Applicant is not an heir. The relevance of the alleged acrimony between heirs is not apparent. The Respondent alleges in ground 30 that the Court disregarded that mere conflict between Executor and Applicant is not grounds for Respondent's removal and further disregarded the body of law that removal of an executor is an extraordinary step. The Court acknowledges that it should not readily remove an Executor from office early in the judgment. Without any reference to the offending paragraph or portions of the judgment, the Court finds it difficult to understand this ground of appeal. Ground 31 suffers the same fate as ground 30. The Court was cognisant that the Respondent was Executor testamentary and attached the weight required when deciding to terminate his executorship. The Court acknowledged that the deceased tasked the Respondent to protect the minor children's inheritance. Ground 32, concerning the Respondent's intention to carry out the testator's wishes, hangs in mid-air. It is incomprehensible, with no elaboration or reference to the parts of the judgment it attacks.
9. Yet other grounds misconstrued the tenor of the judgment. Ground 15, concerning paragraph 137 of the judgment, alleges the Court found that the Respondent intended to retain the close corporation for Sandra's benefit. The Court's finding was not directed at the Respondent's obligation to Sandra but rather to the effect of the proposed redistribution plan on the Applicant. Ground 25, directed at paragraph 122 of the judgment, completely misreads the meaning of the paragraph. The Court identified certain themes concerning the Respondent's suitability to remain as Executor. The sentence's context and construction refer to the Respondent's unsuitability to remain as Executor.
10. Other grounds were raised without checking the facts that informed the findings. Ground 18 accuses the Court of relying on the Applicant's hearsay evidence to conclude that the Respondent and the deceased sought to stifle the Applicant's half share of the joint estate. The Court did not need the Applicant's say so on those aspects. The parties had placed emails and letters before the Court, the content of which evinced those aspects.

Similarly, Grounds 19 and 20 allege that the Court erred in considering events and litigation before the First Respondent was appointed executor as grounds for his removal. The Court decided on the case that had been placed before it. An elementary analysis of the Respondent's papers reveals that he was intent on defending his position as attorney to the deceased and cited chapter and verse about his engagement as the deceased's lawyer. It indeed impacted the court's findings for the correct reason, as it displayed the Respondent's bias against the Applicant.

11. Other grounds of appeal were just fatuous, e.g., ground 5, which contends that the Court erred in considering the will where no application to set it aside was made. The will was central to the adjudication of this matter. Ground 8.7 was based on paragraphs 125, 128, and 129 of the judgment. The Respondent takes issue with the Court's finding asserting that the Respondent did not allege that the transfers to H[...] were to restructure the deceased's debt. The Respondent allegedly stated that when he represented the deceased in the divorce proceedings, his instructions were that this was the purpose of the transfer. The Court cannot distinguish the difference, let alone determine how this could constitute a ground of appeal.
12. Ground 8.14 refers to the incorrect summation of the Respondent's decision to withdraw the litigation in Germany in October 2023 without elaboration. The Respondent referenced paragraph 129 of the

## judgment

for this error. The judgment says exactly that. The Respondent's intention to intervene and withdraw the action against H[...]....demonstrated his unwavering attempts to halt the Applicant's litigation.

13. Ground 13 takes issue with the Court's industry in converting Euro exchange rates to Rand value. The Court did this to enable the reader to understand the value in South African currency. The Respondent contends that the Court required expert evidence about the property market in Germany before it could reach a decision. The Court did not require expert evidence on this aspect.

## OTHER GROUNDS OF APPEAL

14. Ground 9 Refers to the Court's finding in paragraph 134 of the

## judgment

that the Respondent failed to answer the allegation that the transfer of the properties occurred in four days rather than the usual six weeks. The Respondent asserts that the Court erred in not considering that the Respondent was not involved in the transfer and

had no knowledge of it. The Court correctly found that the Respondent had failed to answer this allegation, and the Court was correct in drawing a negative finding against him. The Respondent's failure to answer the allegation relating to the expedited transfer

of units must be assessed in the context of the Respondent's vast knowledge of the details relating to the alienation of those units. The Respondent's four-page answer to the corresponding paragraphs of the founding affidavit bears testimony to the fact that he could cite minutiae about these events but shied away from answering material aspects of the Applicant's case.

15. In Ground 10, the Respondent alleges that the Court erred in finding that the Respondent intended to halt the Applicant's German litigation and withdraw the claim against H[...]. The Respondent refers to page 272 of the bundle and annexure EB 17. In the first place, page 272 of the bundle is a document in German. Secondly, the

letter the Respondent refer to begins on page 273 and carries a different annexure number (which differs from the two numbers quoted

by the Respondent. This is yet another instance of the Respondent failing to take the trouble to identify documents and page references

correctly and expecting the Court to do the work for him. The penultimate paragraph of page 274 states the following: "I

have, after careful consideration of all aspects regarding the German litigation and after careful perusal of the Court documentation, come to the conclusion that it will not be in the interest of the estate to pursue the litigation against H[...] B[...] or his wife Ina and further, and I intend to withdraw the litigation against Mr H[...] on the following basis and for the following reasons..."

16. Ground 11 alleges that the Court erred in finding that the litigation in Germany was between the Applicant and H[...] and that the First Respondent was not obliged to pursue foreign assets in circumstances

where the relief sought by the Applicant is the return of assets to the joint estate over which the First Respondent exercises control and has a direct and substantial interest. The substance of the judgment, i.e., that an Executor is not obliged to pursue foreign assets of an estate, is a statement of the law. The credible evidence before the Court is that the Respondent was not pursuing the German assets. The Respondent was not pursuing the deceased's German assets. He clearly intended to stop the litigation, which was a private matter between the Applicant and H[...].

17. Ground 14 takes issue with the Court interrogating the Respondent's value attached to the close corporation in the draft liquidation and distribution account. The Respondent asserted that the document was

prepared as a discussion document, and he had not determined whether part of the loan had prescribed. The Court should have accepted the explanation as reasonable, given that the First Respondent had corrected the Applicant's attorney's loan valuation. The Respondent did not reference the part of the bundle where these allegations were made. The Respondent valued the loan account in the close corporation at R6 million when the evidence before the court indicated it was closer to about R35 million. There was no basis for the Respondent to devalue the deceased's loan account in the close corporation to that extent. The Respondent had sufficient time to determine whether parts of the loan account had prescribed.

18. Ground 16 also refers to the draft liquidation and distribution account. The evidence indicated that the document undervalued the estate. The Court did not have to consider that the Applicant could object when the account was placed before the Master before making this finding. The Respondent could not identify the paragraphs of the

judgment that dealt with this aspect.

19. Ground 21 alleged that the Court raised on its own accord the Respondent's failure to submit a liquidation and distribution account timeously. The Respondent alleged that neither party dealt with this aspect in the papers. This is incorrect. Ms B[...] referred to the delay in dealing with aspects of the estate on pages 111 and 126 of the record. The timeous submission of the account is an integral part of an Executor's obligation to an estate.[1] Paragraph 96 of the founding affidavit foreshadows the parties' exchange about the liquidation and distribution account in the

annexures and the answering affidavit.

20. In ground 28, the Respondent alleges the Court's finding that the Respondent had delayed the estate's administration was speculative. Again, the Respondent has not read the judgment properly

before presenting it as a ground of appeal. The Court dealt with the liquidation and distribution account and section 35 of the Act. In an application for the removal of an Executor, this aspect becomes material to that determination against the backdrop that the Applicant consistently alleged that her interests were ignored. The emails and letters exchanged between the legal representatives of the parties and attached as annexures allude to the Respondent's delay in administering the estate.

21. Ground 17 is directed at the Court's finding that the Respondent had a low threshold for litigating against the Applicant. The Respondent alleges that the finding is incorrect. The evidence of

actual and threatened litigation against the Applicant belies this ground of appeal. The Respondent's intervention in the German litigation and his application to interdict the Applicant from interfering in the administration of the estate confirm that the finding was correct.

22. Ground 24 hangs in the air without any elaboration. The Respondent has not directed the Court to the negative credibility finding it has made against him. It is correct that the Court did not spare the

Applicant from criticism regarding her extravagant allegations made across her papers, but that was insufficient to make a finding

against her.

23. Ground 29 is based on hearsay. The Respondent contended that the Court had not considered that none of the heirs took issue with the administration of the estate by the First Respondent, nor did they

complain of the delays in finalising the estate. The information relating to the administration of the estate is completely hearsay.

The Respondent did not refer to the heirs complaining of any delays as he did regarding the administration. The Respondent

contended that Sandra alone, one of the heirs, did not object to him being the estate executor.

24. Ground 34 alleges that “The Court erred in rejecting the evidence of the First Respondent that the deceased was reasonably active and of sound faculties should be rejected”. The latter part of this ground is incomprehensible. The evidence contained in a letter addressed to the children’s school, copied to the Respondent and attached to the Respondent’s answering affidavit, indicates that the deceased was ill and not in the condition that the Respondent would have had the Court believe.

25. Ground 35 alleges that the Court erroneously concluded that the First Respondent’s 4% member’s interest in the close corporation created a conflict. The Court finds it difficult to

comprehend how the Respondent can persist with this allegation. The Respondent’s 4% inheritance creates a conflict of interest, as is evident in his valuation of the corporation.

26. Grounds 37 to 41 suggest that the Court erred in applying the Plascon Evans Rule to the disputes of fact. The Respondent alleges that the Court failed to set out which disputes of fact were considered

genuine and which were decided in the Respondent's favour and why. The Court is also accused of not setting out the basis upon which it decided that certain defences raised by the Respondent did not raise a real, genuine, or bona fide dispute of fact and why. The Respondent alleges that the Court’s incorrect summation of the facts could not have led to a correct application of Plascon Evans. The Respondent alleges further that on a proper application of the test, the facts required by the Applicant to support the relief sought could not have been proven. The Court, having held that the disputes of fact patently apparent to the Applicant before launching the application, should have resulted in the dismissal of the application.

27. The Respondent has sought to level every conceivable misapplication to how the Court applied the test in this judgment. The Applicant has placed the onus on the Court to find the instances where the test was applied and defend it. The Respondent wanted the Court to trawl through every dispute of fact, of which there were hundreds, to satisfy the Respondent. These grounds are unsustainable and fall to be rejected out of hand.

#### GROUND OF APPEAL RELATING TO COSTS

28. Ground 23 is the first of many of the grounds directed at the costs

#### orders

granted by the Court. Ground 23 is incomprehensible. The Court granted the application for substitution of the Respondent in his

personal capacity as the law requires. The Respondent did not object to the application. The Court then refused the Respondent's

application to strike out defined material but granted the Respondent's application to disallow affidavits that were filed

out of time. The Court did not grant any order of costs against the Respondent or the Applicant for these three applications and

expressed no further comment.

29. In ground 36, the Respondent alleges that the Court erred in disallowing the prescribed executor's fees of 3.5% as provided for in the will. Once the Respondent ceased being an Executor, he was not entitled to claim the 3.5% fee. The Court ordered that his fees be determined under the applicable legislation. The Court outlined the relevant provisions of the Administration of Estates Act 66 of 1965 and referred that aspect to the Master.[2] There is also no reference to a 3.5% fee in the will.

30. The Respondent alleges that the Court erred in ordering him to pay the costs in his personal capacity because the relief was sought against the Respondent as Executor, the body of authority provided

for costs to be borne by the Estate and was disregarded by the Court in the exercise of its discretion. The Respondent contended further that the Court did not explain the *de bonis propriis* order, and the punitive costs order contradicts paragraph 156 of the judgment in which the Court concluded that it was averse to granting

punitive costs orders but granted costs *de bonis propriis*. This ground is incomprehensible as the Court did not make any costs *de bonis propriis* orders or any orders that amount to it.

31. The Respondent alleges that the Court erred in granting an order precluding the Respondent or his attorney firm from recovering legal costs to the litigation in Germany because the relief sought did not appear from the Applicant's papers, the relief was first raised by the

Applicant's counsel in argument in reply, the Respondent objected to this relief sought. The principle of audi alteram partem was disregarded, and neither the Respondent nor the firm was allowed to address the submission and prayer. The Court ordered against a party that was not before it, and the Court erroneously assumed that Brand & Van Den der Bergh Attorneys was the Applicant's firm.

32. The order stated, "The First Respondent or his attorney firm shall not be entitled to claim any legal costs relating to the intervention in the matters involving the Applicant in Germany from the date of his appointment as Executor to the date of this judgment." The evidence before the Court in the liquidation and distribution account lists the fees of the Respondent's attorney firm. The court did not infer that the Respondent was the owner when it referred to the Respondent's firm. Still, the Court papers evincing the Respondent as an attorney in the firm and the Respondent's presence in Court without any other person inferred that the Respondent was acting in a binary role. as the attorney and the Respondent instructing Counsel. Furthermore, the issue of the Respondent's fees was foreshadowed in the founding affidavit. The judgment cited the relevant caselaw supporting the contention that an application for the removal of an Executor is a claim against the Executor in his personal capacity.
33. Neither did the Court err in granting Counsel's fees on scale C, where the default position is scale A, and no argument regarding scale was presented. The new rule 67A does not diminish the Court's discretion to award an appropriate costs order. The Court considered the complexity of the case and the importance of the relief sought in granting the advocate's fee on scale C.
34. The Respondent sought to introduce a further ground of appeal in its

### **submissions.**

The Respondent submitted that the case has a novel aspect in that the deceased's spouse, who was not an heir, sought the removal of the Respondent as Executor. The situation was not directly on point with any of the authorities the parties and the Court relied upon. Respondent's Counsel was asked to point to the multitudinous grounds of appeal where this ground was raised.

Respondent's Counsel was unable to do so. Respondent did not allege that the Court erred or misdirected itself in any aspect

relating to this belated ground to warrant leave to appeal.

35. Finally, the most objectionable grounds of appeal (grounds 1 and 2) are related to the introductory passage of the judgment and the Court's prerogative to define a starting point of the adjudication. Neither constitute the ratio nor are they expressed obiter or as findings of the Court. How they are appealable is imponderable.

36. The Applicant in the main case, Ms B[...], experienced similar difficulties correlating the grounds of appeal to alleged findings and conclusions in the judgment. Ms B[...] asserted that even if the judgment summarised the facts incorrectly, a contention she did not support, it is irrelevant in the context of the leave to appeal unless it was material to the decision. The Respondent failed to address the latter aspect. The Court notes that apart from failing to identify any fact allegedly incorrectly summarised, the Respondent failed to direct the Court or Ms B[...] to the references in the bundle of documents. The Court has shown that in many of these instances, the Respondent did not check its papers before alleging that a fact was incorrect.
37. A Court can at least expect Counsel to know their papers before raising grounds of appeal. It is unpleasant for the Court to point out to Counsel that the allegations they allege were incorrect, emanated from their client's papers or that the Court knew the content of their papers better than they did. A Court can, at least,

expect Counsel to apply themselves meticulously to the task at hand and couch the grounds of appeal in a comprehensible manner to permit the Court and the opponent to identify the source of their Client's complaints.

38. An appeal should be granted only when there is a sound, rational basis for the conclusion that there are prospects of success on appeal.[3] There must be a reasonable prospect of an appeal succeeding or a compelling reason to hear it. Parties should not be put through the inconvenience and expense of an appeal without merit.[4] The Respondent's Counsel argued the application for leave to appeal on the basis that another Court may come to a different conclusion on many of the grounds of appeal. The Respondent sought leave to appeal to the full bench of this Court, alternatively to the Supreme Court of Appeal.
39. After careful consideration, the Court could not identify a single ground of appeal raised by the Respondent as worthy of referral. The application for leave to appeal falls to be dismissed with costs.

## ORDER

1. The application for leave to appeal is dismissed with costs,
2. Applicant's Counsel's fees are to be taxed or agreed to on Scale C.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

Cape Town

## Judgment

was handed down and delivered to the parties by e-mail on 6 December 2024.

- [1] Section 35(1) of the Administration of Estates Act 66 of 1965, see paragraph 93 of the judgment.
- [2] See paragraphs 147-153 of the judgment
- [3] S v Smith [2011] ZASCA 15; 2012  
(1) SACR 567 (SCA) para 7
- [4] Four Wheel Drive Accessory Distributors CC v Rattan NO (1048/17) [2018] ZASCA 124; 2019  
(3) SA 451 (SCA) (26 September 2018) at para 3

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